Filed August 13, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-5300, 92-5301, 92-5534 & 92-5535

WILLIAM W. EVANS,

Appellant at Nos. 92-5300 & 92-5534

v.

UNITED ARAB SHIPPING COMPANY S.A.G.; M/V AL WATTYAH, her engines, boilers, equipment, etc.

UNITED ARAB SHIPPING COMPANY S.A.G.,

Appellant at Nos. 92-5301 & 92-5535

Appeal from the United States District Court
for the District of New Jersey

(D.C. Civil Docket No. 89-05246)

Argued: February 22, 1993

PRESENT: HUTCHINSON, NYGAARD and SEITZ, *Circuit Judges*

(Opinion Filed August 13, 1993)

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OPINION OF THE COURT

HUTCHINSON, *Circuit Judge.*

Appellant/Cross-Appellee, William W. Evans ("Evans"), a compulsory river pilot, brought this action in the United States District Court for the District of New Jersey pursuant to general admiralty and maritime law and the Jones Act ("the Act"), 46 U.S.C.A. app. § 688 (West Supp. 1993).[1] He sought recovery for personal injuries allegedly sustained as a result of the negligence of the appellee/cross-appellant, United Arab Shipping Company

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1. Evans did not specifically plead a Jones Act claim in his complaint; however, without objection, the district court recognized it as such based on the theories on which his case was presented throughout the bench trial. *See* typescript *infra* at 11 n.5.

("UASC" or "shipowner"), as well as the unseaworthiness of UASC's vessel. The district court held that Evans was covered by the Jones Act because a compulsory river pilot qualifies as a "seaman"; furthermore, it held that Evans was employed by the vessel at the time of his injury as the Act requires. Because Evans was unable to show the extent to which his accident aggravated a preexisting neurological condition, however, the district court refused to award him any damages for aggravation of this condition.

At our Docket No. 92-5301, UASC cross-appeals the district court's order holding that Evans is a "seaman" entitled to protection under the Jones Act. According to UASC, Evans lacks the requisite employment relationship with the shipowner as well as the permanent attachment to the vessel that it says is required for seaman status under the Act. As a prerequisite to recovery under the Act, a plaintiff must establish that the injury occurred within the scope of employment. Evans did not establish that he was an employee of UASC within the meaning of the Act and was instead an independent contractor. A shipowner does not have the right to control the actions of a compulsory river pilot or the right to hire or fire that pilot under applicable Delaware law. We hold, therefore, that Evans is not entitled to recover against UASC under the Jones Act because he was not an employee of UASC acting within the course of his employment when he was injured. This disposition makes it unnecessary for us to reach the issue of whether a compulsory river pilot must have a permanent attachment to a particular vessel to claim Jones Act protection.[2] Nevertheless, we will affirm the judgment for

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2. UASC also argues, in the alternative, that even if Evans is covered by the Jones Act, he has not met his burden of proving that UASC aggravated his preexisting neurological condition. At our Docket No. 92-5300, Evans alleges that the district court erred in: (1) placing the burden of establishing the amount of damages representing aggravation of his preexisting neurological disease caused by UASC's negligence upon him; and (2) determining that he did not meet this burden and therefore awarding no damages for aggravation of his pre-existing neurological condition. Because of our conclusion on UASC's cross-appeal that Evans cannot maintain a Jones Act action, these issues are also avoided.

Evans, but on different reasoning than that used by the district court.

The district court has already determined that Evans has not established a legal or proximate cause between the shipowner's acts and aggravation of Evans's preexisting neurological disease under traditional causation principles and, instead, based its conclusion on the Jones Act's "featherweight" standard of causation. *Evans v. United Arab Shipping Co.*, 767 F. Supp. 1284, 1293 (D.N.J. 1991) (*Evans I*). The Jones Act's featherweight standard, in common with most workers' compensation statutes, extends common law definitions of legal cause to include precipitation as well as aggravation. Without the Act's recognition of this broader rippling effect, the medical evidence Evans presented is insufficient to show that his accident while descending the ship's ladder aggravated his preexisting, but largely asymptomatic, neurological disease. Absent the Act's extension of traditional views on the limits of legal or proximate cause, we agree with the district court's conclusion that this essential element to recovery for aggravation of Evans's neurological disease is lacking. A remand to the district court for a determination of whether Evans can recover under general admiralty and maritime law for aggravation of his neurological condition, therefore, is likewise unnecessary. USAC has conceded liability for Evans's orthopedic injury. Accordingly, we will affirm the district court's order entering judgment for Evans in the amount of $23,630.00 for the orthopedic injuries he suffered, lost wages and pain and suffering and will do so. *See Evans v. United Arab Shipping Co.*, 790 F. Supp. 516, 520 (D.N.J. 1992) (*Evans II*).

I.

Evans was a compulsory river pilot licensed by the United States Coast Guard and the State of Delaware for over forty years.[3] As a pilot, Evans was hired to steer ships

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3. Pursuant to 46 U.S.C.A. § 8501 (West Supp. 1993, Partial Revision) (delegating to the states the continued regulation of pilotage), Delaware requires all vessels entering the Delaware Bay to take a state licensed

through the Delaware River and Bay and the Chesapeake and Delaware Canal. During all times material to this action, Evans was a member of the Pilot's Association for the Bay and River Delaware ("the Association"). He paid federal income taxes from 1986-89 as a self-employed taxpayer.

UASC is jointly owned by the governments of Saudi Arabia, Kuwait, Iraq, United Arab Emirates, Bahrain and Qatar. It owns and operates the container vessel M/V AL WATTYAH. On the night of September 9-10, 1989, Evans was on call at the Lewes, Delaware pilot station and was called to pilot the M/V AL WATTYAH toward the Chesapeake and Delaware Canal as far as Chesapeake City, Maryland where a Maryland pilot was to take over the helm. A pilot launch took Evans to the ship, which he boarded by a rope ladder with wooden rungs, known as a pilot ladder or "Jacob's ladder." Evans had difficulty in boarding from this ladder because it was in poor condition but climbed aboard the vessel without incident. He then piloted the ship to the Maryland border. As the vessel approached the point where the Maryland pilot was to board, Evans asked the master to rig the starboard side accommodation ladder so that he could disembark without using the poorly maintained Jacob's ladder that had made boarding difficult. The accommodation ladder was a staircase built of galvanized steel or aluminum, attached at its top to the main deck of the vessel, from which it was lowered to within a few feet of the water's surface. At its lower end there was an attached adjustable platform that could be fixed in position parallel to the water.

At trial, the parties did not dispute the circumstances of the accident. The pilot launch arrived at the vessel with the Maryland pilot on board. He stepped from the launch onto the lowest rung of the accommodation ladder without ever

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pilot aboard or be subject to penalties and fines. *See* Del. Code Ann. tit. 23, § 121 (1987). The statute also recognizes that the vessel may have to carry the pilot to sea if he cannot be removed from the vessel at the outer edge of the pilotage ground with safety. *See id.* § 132 (1987) (compelling compensation for pilot carried to sea).

setting foot on the lower platform. A few minutes later, a seaman from the M/V AL WATTYAH started down the accommodation ladder to deliver Evans's briefcase to the launch and to assist Evans in leaving the vessel. As the seaman stepped onto the lower platform, it pivoted and dropped. The seaman fell but suffered no injury. After seeing the seaman examine the platform, Evans inquired whether it was safe to use the accommodation ladder. Evans understood the seaman's response to mean that the ladder was safe and he proceeded to descend. When he reached the lowest rung, he stepped onto the platform. It pivoted on its axle and dropped out from under him. He shifted his weight to the handrail. The handrail collapsed and he fell and struck the deck of the launch with his tailbone. In the fall Evans's face and left rib cage hit the outboard channel of the accommodation ladder. Shaken, Evans succeeded in climbing aboard the launch with the assistance of another seaman. *See Evans I*, 767 F. Supp. at 1285-87.

Evans brought this action against UASC as the shipowner and the M/V AL WATTYAH *in rem*, seeking damages under general admiralty and maritime law for orthopedic and neurological injuries suffered while disembarking from UASC's vessel. Evans pleaded a negligence and unseaworthiness theory against UASC and the vessel. He did not specifically plead a Jones Act claim in his complaint; however, he raised that theory in the district court and tried his case on it without timely objection. *See infra* n.5. In his complaint, Evans alleged that he suffered orthopedic injuries which included a fractured nose, fractured ribs and a fractured coccyx. X-rays revealed that he did, in fact, suffer a fractured nose, but he produced no evidence to show any other orthopedic injury.

According to Evans, within one or two days of the accident, he and his wife noticed for the first time a slurring of his speech and a weakness and lack of balance in his walking. There has been a steady deterioration in his ability to speak or walk ever since the accident. His worsening condition has led to several serious falls since the accident. One, in February 1990, resulted in a

fractured wrist, and in May 1990 another led to a fractured hip. Evans has been treated by several neurologists since the accident. Sadly, as it turns out, Evans continues to suffer from a serious neurological disease which causes progressive deterioration of his motor functions. He is now unable to swallow because bulbar paralysis affects his tongue and, at the time of trial, could expect soon to be bound to a wheelchair. Because of his deteriorating condition, he has not piloted a vessel since November 10, 1989, and in June 1990 he was unable to pass the annual physical exam required to renew his state pilot's license.

Evans presented evidence that he was healthy before the September 1989 accident. In July 1989 in France, he had successfully completed a week long course in ship handling that is required of all Delaware Bay and River pilots. A fellow pilot who took the course with him did not notice any neurological or physical impairment. The evidence given at trial on Evans's good health before the accident is, however, conflicting. Dr. Bhatt, one of Evans's treating neurologists, testified that he complained of difficulty walking and with balance "for the last few months" at an examination on October 4, 1989. Joint Appendix (Jt. App.) at 79-80. Dr. Cook, another of Evans's treating neurologists, similarly noted on January 16, 1990, that "prefall," *i.e.* before the September 10, 1989, accident, Evans had complained that his legs were tired and his balance was off. Dr. Cook testified that at the time of the accident, Evans had not been diagnosed as having any motor neuron disease but that the condition probably existed in a dormant state.

Because of medical science's uncertainty in the face of neurological disorders similar to Evans's illness, no doctor has been able to provide a firm diagnosis of his neurological condition. Dr. Cook described Evans's illness as an unusual genus of motor neuron disease resembling amyotrophic lateral sclerosis ("ALS"). According to Dr. Cook, absent this accident, Evans's prognosis would have been unclear but he may never otherwise have experienced the disabling symptoms which now affect him.

Dr. Duvoisin, UASC's medical expert, after performing a neurological examination of Evans and reviewing his medical records, diagnosed Evans's condition as

olivopontocerebellar atrophy ("OPCA"), a condition with nerve degeneration that resembles ALS but otherwise also generally presents symptoms like those of Parkinson's disease. Dr. Cook testified that medical science does not know what causes ALS or any other motor neuron disease; but some controlled case studies reported in the medical literature indicate that trauma could be a causative factor of the disease or at least bring out the dormant symptomatology. Dr. Cook could not, however, testify with a reasonable degree of medical certainty that the trauma of the accident most likely precipitated an otherwise latent problem; he could state only that it was "entirely possible" and that he "relat[ed] the onset of Evans's motor neuron disease . . . to the fall he suffered on September 10, 1989." Jt. App. at 115, 116. Dr. Duvoisin, on the other hand, attempted to rule out trauma as a causal factor in Evans's neurological disease. He opined that there was probably a genetic link to the disease. He conceded, however, that he could not completely rule out trauma as a causative factor "one million percent" but considered it extremely improbable and "philosophically meaningless."[4] Jt. App. at 96-97. Medical articles reporting cases that could support the trauma theory were identified by the experts at trial but not introduced as affirmative evidence on Evans's behalf.

On July 30, 1991, after considering all of the evidence, the district court issued an interim opinion and order holding that Evans was a "seaman" under the Jones Act. *Evans I*, 767 F. Supp. at 1288-91. It further determined that Evans sustained personal injuries as a result of the negligence of the shipowner because the crew of the vessel had negligently rigged the platform and handrail of the accommodation ladder. *Id.* at 1292. It found that the handrail on the outboard side of the ladder was defective because a stanchion was missing, causing it to collapse when Evans leaned on it, *id.*, and that a motor neuron disease resembling ALS permanently disabled Evans. The court then found that the motor neuron disease preexisted

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4. We note that a physician's view of causation is not that of a judge or lawyer who thinks of causation not only in terms of etiology but also in terms of aggravation or, in the workers' compensation context, precipitation.

the fall but had been relatively asymptomatic and almost completely latent before the fall, and therefore the shipowner's negligence aggravated it. *Id.* at 1293.

The district court also found legal cause with respect to the orthopedic injuries. *id.* at 1292-93, but after considering the evidence, found that Evans missed only thirty-eight days of work, from September 11, 1989, until October 26, 1989, as a direct result of the accident. *Id.* at 1287. With respect to the aggravation of Evans's neurological disease, the court concluded "[i]f this were not a Jones Act case with its attendant 'featherweight' standard for proving causation, then this court would find that defendant's negligence did not proximately cause or aggravate plaintiff's neurological injuries." *Id.* at 1293. Under the featherweight standard of causation, the district court believed the circumstantial evidence was sufficient to permit an inference that Evans's fall from the ladder aggravated his neurological symptomatology. *Id.* Nevertheless, the district court was unable, without engaging in speculation, to separate the injury and damages attributable to the aggravation of Evans's neurological disease from those the disease would have caused in any event. *Id.* at 1294. Therefore, it ordered the record reopened for receipt and consideration of evidence on segregation of the damages attributable to the accident's aggravation of Evans's neurological disease from those caused by the underlying disease in its normal course. *Id.*

On November 22, 1991, the district court issued an order placing on Evans the burden of establishing the damages separately attributable to the shipowner's tortious aggravation of his latent motor neuron dysfunction because he was in the best position to do so. On February 6, 1992, the district court denied Evans's motion for reconsideration of its ruling on the burden of segregating damages. On March 17, 1992, the district court also denied UASC's motion for reconsideration of its determination that Evans was a Jones Act seaman.

In its final order and opinion, dated May 1, 1992, the district court entered judgment in favor of Evans on his Jones Act claim; however, the court held that Evans failed to produce evidence sufficient to establish the extent to

which his preexisting neurological condition was aggravated by the shipowner's negligence. *Evans II*, 790 F. Supp. at 518-20. The district court therefore awarded Evans damages only for his fractured nose plus lost earnings of $15,155.00 for thirty-eight days, medical expenses of $875.00 for treatment of the fractured nose, and $7,600.00 for pain, suffering, and loss of enjoyment for his nose injury together with prejudgment interest. *Id.* at 520. Evans filed a timely notice of appeal on May 29, 1992. UASC filed a cross-appeal on June 4, 1992.

II.

The district court had subject matter jurisdiction over this admiralty action under 28 U.S.C.A. § 1333 (West 1966) and the Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1330 (West Supp. 1993). We have appellate jurisdiction over the final order of the district court pursuant to 28 U.S.C.A. § 1291 (West Supp. 1993).

Construction of the statutory term "seaman" is a question of law. *McDermott Int'l, Inc. v. Wilander*, 111 S. Ct. 807, 818 (1991). Thus we exercise plenary review over the district court's interpretation of the term "seaman" under the Act. Whether Evans ultimately qualifies as a "seaman" under the Act is a mixed question of law and fact. *Id.* This Court's cases leave things somewhat unclear about the scope of review over a district court's conclusion concerning a worker's status as an employee. In a Jones Act case, *Matute v. Lloyd Bermuda Lines, Ltd.*, 931 F.2d 231 (3d Cir.), *cert. denied*, 112 S. Ct. 329 (1991), we stated, "The existence of an employer-employee relationship is a question of fact . . . ." *Id.* at 236. In a later case involving the Fair Labor Standards Act, *Martin v. Selker Brothers, Inc.*, 949 F.2d 1286 (3d Cir. 1991), we opined, "The employment status of the [employees] is a legal conclusion. Thus, our standard of review . . . is plenary." *Id.* at 1292 (citation omitted). We think these cases indicate that employer-employee status is sometimes, as here, a mixed question of law and fact. Accordingly, in this case we will exercise plenary review over the district court's selection of the standard by which employment status is judged, but overturn its subsidiary factual findings only if they are

clearly erroneous. *See* Fed. R. Civ. P. 52(a). Once the underlying facts are established, and the rule of law is undisputed, the issue of whether the facts meet the statutory standard is an issue of law. *McDermott*, 111 S. Ct. at 818.

III.

Jones Act Claim[5]

Congress passed the Jones Act in 1920 to overrule the United States Supreme Court's decision in *The Osceola*, 189 U.S. 158 (1903). *See McDermott*, 111 S. Ct. at 810-11. *The Osceola* held that seamen had a general maritime right to maintenance and cure and wages, as well as a right to recover for unseaworthiness, but were excluded from the general maritime negligence remedy against the shipowner. *See id.* at 810 (citing *The Osceola*, 189 U.S. at 175); *see*

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5. UASC alleges that Evans's Jones Act claim is barred because he failed to plead Jones Act status in his complaint. The Jones Act claim was, however, raised and argued fully at the bench trial. Federal Rule of Civil Procedure 15(b) provides when issues not raised by the pleadings are tried by implied consent of the parties, they shall be treated as if they had been raised in the pleadings. Amendments are to be freely granted upon motion even after judgment unless the opposing party can show prejudice. Fed. R. Civ. P. 15(b). In this case, Evans did not move to amend the pleadings. Failure to move to amend the pleadings to conform to the evidence does not affect the result of the trial.

Evans asserts that the Jones Act claim was argued without objection from UASC and therefore any objection has been waived. *See Altman v. Altman*, 653 F.2d 755, 758 (3d Cir. 1981) (issue not raised in district court will not be heard on appeal absent exceptional circumstances). UASC claims that it objected to Evans's Jones Act status in a letter-memorandum to the district judge dated March 24, 1992. There is no evidence of this letter in the district court docket sheet or the record before us. We are thus unable to consider it. In any event, this letter was allegedly submitted to the district court after conclusion of the bench trial on March 7, 1991, after the district court issued its interim opinion and order holding that Evans was a "seaman" under the Jones Act on July 30, 1991, and after the district court denied UASC's motion to reconsider its Jones Act status determination on March 17, 1992. Therefore, UASC failed to preserve this procedural issue for appeal.

also Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 328-29 (2d ed. 1975) ("The only purpose of the Jones Act was to remove the bar created by The Osceola, so that seamen would have the same rights to recover for negligence as other tort victims."). Because the Jones Act created new rights for "seamen," it should be liberally construed to accomplish its beneficent purposes. *See Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 790 (1949).

The Jones Act provides, in pertinent part:

> Any *seaman* who shall suffer personal injury *in the course of his employment* may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such actions all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . .

46 U.S.C.A. app. § 688(a) (emphasis added). The Jones Act does not define the terms "seaman"[6] or "in the course of his employment." We have, on prior occasions, considered the scope of the term "seaman" but never in the context of a compulsory pilot. *See Mach v. Pennsylvania R.R. Co.*, 317 F.2d 761 (3d Cir. 1963); *see also Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976). Case law that had developed on the definition of seaman before the Supreme Court's decision in *McDermott* required a permanent connection to a particular vessel, both generally and specifically, with respect to traditional compulsory pilots. *See, e.g., Bach v. Trident S.S. Co.*, 920 F.2d 322, 324-25 (5th Cir.), *vacated and remanded*, 111 S. Ct. 2253, *reaff'd on remand*, 947

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6. Statutory definitions of "seaman" appear only in an unrelated merchant seamen's protection and relief provision and a provision dealing with maritime commercial instruments and liens. The merchant seaman provision states: " 'seaman' means an individual (except scientific personnel, a sailing school instructor, or a sailing school student) engaged or employed in any capacity on board a vessel." 46 U.S.C.A. § 10101 (West Supp. 1993, Partial Revision). The maritime lien provision states: " 'seaman' means a master or a crewmember of a vessel in operation." 46 U.S.C.A. § 30101(5) (West Supp. 1993 Partial Revision).

F.2d 1290 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1996 (1992); *Clark v. Solomon Nav. Ltd.*, 631 F. Supp. 1275, 1279 (S.D.N.Y. 1986). Following *McDermott*, the Court of Appeals for the Fifth Circuit held, over a vigorous dissent, the permanent connection requirement as applied to compulsory pilots survived *McDermott*. *See Bach*, 947 F.2d at 1291. This Court's case law is not entirely clear on how the permanent connection factor applies to persons who perform the core functions of a seaman on a vessel in navigation.[7] Because we conclude a compulsory river pilot such as Evans is not an employee of the vessel he pilots, he would be unable to recover under the Jones Act even if he is a seaman. Accordingly, we do not decide whether the requirement of permanent attachment survives *McDermott* with respect to Jones Act coverage of persons who, like compulsory pilots, perform core navigational functions on a traditional vessel plying the seas or waterways in the traditional way of trading vessels, as opposed to the various kinds of recently developed more or less fixed offshore platforms in whose context the permanent attachment

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7. In *Griffith*, we set forth three factors to determine whether a land based barge loader was covered under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C.A. §§ 901-950 (West 1986 & Supp. 1993) or under the Jones Act as a seaman. We required that (1) the ship be in navigation; (2) there be a more or less permanent connection with the ship; and (3) the worker be aboard primarily to aid in navigation. *Griffith*, 521 F.2d at 36 (quoting M. Norris, *The Law of Seamen* § 668 at 301 (3d ed. 1970)). In our previous decision in *Mach*, we had held that a bargeman who was permanently employed at a railroad dock and who was injured while moving a barge into position for unloading at the dock was a "seaman" under the Act. *Mach*, 317 F.2d at 764. *Mach* did not mention who owned the barges. *Griffith* distinguished *Mach* on the basis that the bargeman in *Mach* was *permanently* assigned to work at the river landing for the defendant railroad where a substantial amount of his work occurred on barges and involved navigational functions. *Griffith*, 521 F.2d at 38. *Mach*, the earlier case, could be controlling. It did not require permanent attachment to a particular vessel for Jones Act seaman status, but only a job in which a substantial portion of the employee's duties were performed in the navigation of a vessel. *Id.*

requirement was largely developed. *See Bach*, 920 F.2d at 333 (Brown, J., dissenting).[8]

The Jones Act provides a remedy for "any seaman who shall suffer personal injury *in the course of his employment* . . . ." 46 U.S.C.A. app. § 688(a) (emphasis added).[9] Thus, as a prerequisite to recovery under the Act, the plaintiff must establish an employment relationship with the defendant. *Matute*, 931 F.2d at 235-36 ("The Jones Act provides seamen a suit for damages against employers for injuries incurred while at sea, and the plaintiff must establish an employment relationship to recover under the Act."); *Simko v. C&C Marine Maint. Co.*, 594 F.2d 960, 963 n.2 (3d Cir.), *cert. denied*, 444 U.S. 833 (1979); *see also Cosmopolitan* Shipping, 337 U.S. at 790-91; *Haskins v. Point Towing Co.*, 421 F.2d 532, 536 (3d Cir.) ("Rights given under the Act are an outgrowth of the peculiar condition of a seaman's employment."), *cert. denied*, 400 U.S. 834 (1970); *McAleer v. Smith*, 818 F. Supp. 486, 192 (D.R.I. 1993). In this respect, the Act is the maritime equivalent of the Federal Employers' Liability Act ("FELA") covering railroad employees. *See* 46 U.S.C.A. § 688.

The district court did not engage in any detailed analysis of the employment question, instead holding that "on the

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8. We note that other courts, including, by implication, the United States Supreme Court, continued to recognize the continuing vitality of the permanent attachment requirement after *McDermott*. *See, e.g., Southwest Marine, Inc. v. Gizoni*, 112 S. Ct. 486, 494 (1991); *McKinley v. All Alaskan Seafoods, Inc.*, 980 F.2d 567, 569 (9th Cir. 1992); *Bach*, 947 F.2d at 1291; *Harwood v. Partrederelt AF 15.5.81*, 944 F.2d 1187, 1192 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1265 (1992). Most of the courts that have specifically considered the test's applicability to compulsory pilots have likewise concluded that a compulsory pilot is not a seaman under the Act because he lacks permanent attachment to an identifiable vessel or fleet of vessels. *See, e.g., Bach*, 947 F.2d at 1291; *Harwood*, 944 F.2d at 1192; *Stoller v. Evergreen Int'l (U.S.A.) Corp.*, No. C92-0466 FMS (N.D. Cal. Sept. 1, 1992); *Ray v. Great Lakes Towing Co.*, No. 3:92CV7034 (N.D. Ohio Feb. 25, 1992) (mem.); *Clark*, 631 F. Supp. at 1279. *But see Bach*, 920 F.2d at 331-33 (Brown, J., dissenting) (persuasively setting forth contrary and logical position).

9. Neither the legislative history of the Jones Act nor that of the LHWCA defines the phrase "in the course of his employment."

morning of September 10, 1989, [Evans] was acting [as a river pilot] aboard the M/V AL WATTYAH when the accident occurred. The ship's owner employed Mr. Evans through the services of the Pilot's Association .... Therefore, he had that 'employment-related connection' essential to determining seaman status." *Evans I*, 767 F. Supp. at 1291 (quoting *McDermott*, 111 S. Ct. at 817). Although making this limited finding with respect to the employment element, the district court did not explicitly determine whether Evans was an employee of UASC and injured "in the course of his employment," a prerequisite for Jones Act liability. Instead, it stated that Evans's work contributed to the mission of the ship and required him to confront the hazards of the sea faced by other members of the ship's crew and summarily concluded, "Mr. Evans, therefore, is entitled to the protection of the Jones Act." *Id.* In doing so, the district court appeared to confuse the in navigation prong of the seaman test with the additional requirement that a seaman be injured in the course of his employment. We believe it is necessary to determine separately whether the requisite employment relationship exists between UASC and Evans.

In determining Evans's employment status, we think it is proper to apply ordinary principles of the law of agency adjusted by an eye on the peculiarities of maritime life. Traditional agency law looks mainly to the degree of control the principal exercises over the agent. *See* Restatement (Second) of Agency § 220(1) (1958) ("A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."). We have noted that factors indicating control include payment, direction, supervision and the power to hire or fire. *See Matute*, 931 F.2d at 236. Other factors include the power to determine the route of the ship and the activities of the crew. *See Cosmopolitan Shipping*, 337 U.S. at 795.

The relation of master and servant may exist although the law requires the selection of a worker from a limited class, and the master is liable for torts servants so selected commit within the scope of employment. Restatement

(Second) of Agency § 223. With respect to compulsory pilots, a comment to the Restatement specifically provides:

> c. *Compulsory pilots.* Under statutes requiring shipowners to accept the services of licensed pilots other than persons already in the shipowner's employ upon entering or leaving port, *the shipowner is not liable for the negligence of the pilot in the navigation of the ship, if the effect of the pilotage statutes is to remove control over the navigation of the ship from the shipowner and place it entirely in the pilot. In such case, the relation of master and servant does not exist between such owner and the pilot.* . . .

Id. § 223 cmt. c. (second emphasis added). We must consider, therefore, the pilotage statute which governs the relationship between Evans and UASC to determine the extent to which it gives control of the ship to the pilot.

The relevant Delaware statute provides for the licensing, training and discipline of pilots. *See generally* Del. Code Ann. tit. 23, §§ 103-137 (1987 & Supp. 1992). It also provides that all ships entering Delaware ports must take a compulsory pilot on board or face a lawsuit by the pilot who offered the services for full pilotage rates either *in personam* or *in rem* through a lien on the vessel.[10] The statute does not address the degree of control over the

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10. The statute provides, in relevant part:

> Every foreign ship or vessel and every ship or vessel engaged in foreign commerce or trade arriving from or bound to any foreign port or place, passing in or out of the entrance to Delaware Bay, and passing between the points of land known as the Capes of the Delaware, shall be obliged to receive a pilot. . . . If the master of any ships or vessels, after she is spoken or a pilot offered, refuses or neglects to take a pilot, the master, owner or consignee of such vessel shall forfeit and pay to any such pilot suing for the same a sum equal to the pilotage of such ship or vessel to be recovered by a suit in the courts of this State . . . or such pilot may pursue his remedy therefor by a libel in admiralty in any United States court either in personam or by proceeding in rem, to enforce the lien given him on such ship or vessel, as such pilot may see fit and proper to do.

Del. Stat. Ann. tit. 23, § 121 (1987).

vessel that the pilot has and the master relinquishes. It is therefore of little help to our analysis.

UASC argues that Evans cannot bring suit against it under the Jones Act because Evans was either an independent contractor, as evidenced by his 1986-89 federal income tax filings as a self-employed taxpayer, or an employee of the Pilots' Association. Evans's tax treatment of his earnings as a pilot is relevant evidence on his employment status, but it is not determinative of the degree of control the shipowner could exercise over him.[11]

Few cases address the application of the Jones Act's employment requirement to compulsory pilots. None have held a compulsory pilot is an employee of a vessel he pilots. Instead, they have held that compulsory pilots are either employees of the pilots' association or independent contractors. *Compare Harwood*, 944 F.2d at 1189 (compulsory harbor pilot who was member of Virginia Pilots' Association held to function as independent contractor) *and Bach v. Trident Shipping Co.*, 708 F. Supp. 772, 773-74 (E.D. La. 1988) (compulsory pilot held to be independent contractor), *aff'd on other grounds*, 920 F.2d 322 (5th Cir.), *vacated and remanded*, 111 S. Ct. 2253, *reaff'd on other grounds*, 947 F.2d 1290 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1996 (1992) *and Clark*, 631 F. Supp. at 1275 (parties agreed that compulsory river pilot who worked for his own company, a member of pilots' association, was independent contractor and not employee of shipowner in suit by pilot brought solely under general maritime law) *with Ray v. Great Lakes Towing Co.*, 92 Civ. 7034 (N.D. Ohio Feb. 25, 1992) (compulsory pilot was employee of pilots' association). *But see Guy v. Donald*, 203 U.S. 399, 407 (1906) (in negligence action by shipowner against members of pilots' association for negligence of its compulsory pilot, association held not liable because had no control over shipboard job performance of its members).

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11. Given the nature of the tasks a compulsory pilot performs, it is difficult to conceive of any other federal taxation category into which Evans would fit. The determination of employee status depends on substance not form, and we decline to accord Evans's tax treatment controlling weight.

In the case at bar, we are persuaded that there is no employer-employee relationship between Evans and the shipowner. In *Bach*, the district court discussed *Magnolia Towing Co. v. Pace*, 378 F.2d 12, 13 (5th Cir. 1967) (per curiam) which affirmed a Jones Act verdict in favor of a river pilot who had worked directly for the defendant for one year, was paid a monthly salary by the defendant and was therefore permanently assigned as pilot to one or another of the defendant's tugboats. The *Bach* court distinguished *Pace* because the pilot in *Pace* was a permanent, salaried employee of the defendant. *Bach*, 708 F. Supp. at 773. On appeal, the employer-employee relationship was not put in issue. *Bach*, 920 F.2d at 324-26. The district court in *Bach* had held that a compulsory pilot, a member of the pilots' association, was an independent contractor even though the shipowner had a right to refuse the pilot's services and incur the penalties the pilotage statute imposed, and the pilot fee was characterized as "wages." *Bach*, 708 F. Supp. at 773-74. The district court concluded that these facts were not inconsistent with a compulsory pilot's status as an independent contractor. *Id.* We agree with the district court in *Bach* that these facts are insufficient to show that a compulsory pilot is employed by the vessel piloted. *See also Bach*, 920 F.2d at 327 n.5 (record did not show that compulsory pilot was employee of anyone).

The cases that concern a shipowner's liability for a pilot's negligence are instructive. Generally, shipowners are not liable for torts committed through the negligence of a compulsory pilot under the theory that the owner had no discretion to select the individual. *See The China*, 74 U.S. (7 Wall) 53 (1868). The vessel, however, may be held liable *in rem*. *See id.* Where the pilot is taken at the discretion of the shipowner, the case for a master-servant relationship is stronger and the owner may be held to answer for the torts of the pilot. *See Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique*, 182 U.S. 406, 416 (1901) (quoting Story, Treatise on Agency 2d ed. § 456a); *see also* Black & Gilmore, *supra*, § 7-16 at 520 ("A pilot may be taken on voluntarily *or* under the compulsion of some local statute or regulation. The voluntary pilot is in much the same position as any other crew member. . . . [I]f

the pilotage is 'compulsory' the *respondeat superior* nexus is broken, and the shipowner cannot be held personally liable for the fault of the pilot resulting in collision."). Even in the case of the compulsory pilot, though, the shipowner may still be liable *in personam* if found to be somehow at fault. *See Chesapeake Bay Bridge & Tunnel Dist. v. Lauritzen*, 404 F.2d 1001, 1007 (4th Cir. 1968) (statutory pilot's presence does not lessen master's duty or authority and shipowner held responsible if master fails to act to correct pilot's dangerous actions); *see also City of Los Angeles v. Standard Transp. Co.*, 32 F.2d 988 (9th Cir. 1929) (safety of all aboard remains with master despite presence of municipal pilot); *Robins Dry Dock & Repair Co. v. Navigazione Libera Triestina S.A.*, 32 F.2d 209, 210 (2d Cir.) (ship captain not totally divested of authority by presence of compulsory pilot), *cert. denied*, 280 U.S. 574 (1929); *cf. The China*, 74 U.S. (7 Wall) at 67-68 (owner may countermand pilot upon discovery of pilot's incapacity or intoxication).

The Delaware statute that required UASC to take Evans on board and accept his services as a pilot is similar to the New York pilotage law the Supreme Court considered in both *Homer Ramsdell* and *The China*. *Compare* Del. Stat. Ann. tit. 23, §§ 117, 121-26 *with* N.Y. Navigation Law § 88 (McKinney 1992). In *Homer Ramsdell*, the Supreme Court held in the case of a compulsory pilot that neither the master nor the shipowner was liable for the negligence of the pilot under common law because the " 'pilot cannot be deemed properly the servant of the master or the owner, but is forced upon them, and the maxim, *Qui facit per aliam facit per se*,[12] does not apply.' " *Homer Ramsdell*, 182 U.S. at 416 (footnote added) (quoting Story, Treatise on Agency 2d § 456a)). Application of this maxim to the relationship between shipowner and compulsory pilot was essential to the result in that case.[13]

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12. The Latin means, "He who acts through another acts himself." Black's Law Dictionary 1124 (5th ed. 1979).

13. The United States District Court for the Eastern District of New York, in a single case, has held that where, under the same New York statute, the vessel could elect to engage a pilot or to have the ship piloted by its

It remains material here, where UASC was also required by statute to pay a fee for Evans's compulsory services. At the completion of the voyage, the ship's master signed the pilot's "ticket" acknowledging that Evans was on board and performed services. Evans subsequently dispatched an invoice for those services to the shipowner. Evans stated in his deposition that he was a self-employed member of the Pilots' Association. As in *The China*, the master of the vessel retained the ability to countermand the pilot in exceptional circumstances and did not relinquish all right of control over the vessel to the compulsory pilot. *See Charente S.S. Co. v. United States*, 12 F.2d 412, 413 (5th Cir. 1926) (master may displace pilot in instance of manifest incompetence); *In re Hercules Carriers, Inc.*, 566 F. Supp. 962, 974, 978-79 (M.D. Fla. 1983), *aff'd*, 761 F.2d 1558 (11th Cir. 1985). But the master has no discretion in selecting or firing a pilot or taking control from him absent an extraordinary situation. The compulsory pilot is in supreme command of the vessel while he is navigating it. Only if he displays gross negligence does the master have the authority to remove a compulsory pilot from the helm or to countermand the pilot's orders and the master, if he does so, acts at the risk of penalty for violation of the state regulatory provision. *See The China*, 74 U.S. at 67-68; *cf. Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 94 (1955) ("Under law and custom [pilots] have an independence wholly incompatible with the general obligations of obedience normally owed by an employee to his employer. . . . As a rule no employer, no person, can tell them how to perform their pilotage duties. . . . [P]ilots are usually free to

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master and pay the pilotage, the pilot engaged by the vessel was an "employee" within the Jones Act with regard to liability for the pilot's death, and *Homer Ramsdell* was not controlling because it presented a situation where a third party was attempting to sue the shipowner for the pilot's negligence. *Peterson v. United New York Sandy Hook Pilots' Ass'n*, 6 F. Supp. 649 (E.D.N.Y. 1934). That case has not been overruled but it also has never been cited and seems directly contrary to the decision in *Homer Ramsdell*. Moreover, the Delaware pilotage statute states that ships entering state waters "shall be obliged to receive a pilot." Del. Code Ann. tit. 23, § 121. No alternative is present and non-compliance requires a forfeiture of the pilot fee. *See id.*

act on their own best judgment while engaged in piloting a vessel."). While we recognize that the master of the vessel may be found negligent and have his license suspended or revoked if he fails to take action to relieve a pilot when he concludes that the pilot is taking the vessel into danger, *see The Oregon*, 158 U.S. 186, 194 (1895); *Ralli v. Troop*, 157 U.S. 386 (1895); *Chesapeake Bay Bridge and Tunnel*, 404 F.2d at 1007, we think this limited control is insufficient to import an employer/employee relationship under the maxim which supplies the Supreme Court's rationale in *Homer Ramsdell*.

Because the principles enunciated in *Homer Ramsdell* are similar to those applicable to the instant case, we believe the vessel and its master, acting in accord with the Delaware statute, lack the ability to control in the degree necessary to create a master-servant relationship. This result seems to us compelled by the shipowner's lack of any choice or discretion in selecting a pilot and the extremely limited circumstances under which an owner may direct the pilot's activity on board the vessel. Though the Supreme Court has recognized in dicta that "the word 'employment' should be construed so as to give protection to seamen for torts committed against them by those standing in the proximate relation of employer, and the rules of private agency should not be rigorously applied," it also cautions us that it would be wrong to "disregard the plain and rational meaning of employment and employer to furnish a seaman a cause of action against one completely outside the broadest lines or definitions of employment or employer." *Cosmopolitan Shipping*, 337 U.S. at 790-91. Accordingly, we hold that Evans has failed to demonstrate the employment relationship with UASC that the Jones Act requires to support his claim.[14]

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14. UASC has conceded the propriety of the orthopedic damages and, therefore, we will affirm that award. It says:

> If this court agrees that Evans is not a Jones Act seaman, then [sic] district court's finding of aggravation should be *reversed*, and the total damages awarded for his orthopedic injuries *affirmed*. . . . Should the district court's finding as to Evans' seaman status be reversed, all other argument will be moot as the present appeals

IV.

In summary, we hold that Evans lacks the requisite employment relationship with the shipowner and is therefore not entitled to maintain a Jones Act action against it. The district court did not err in concluding Evans failed to establish causation between the shipboard accident and aggravation of his preexisting neurological condition without the benefit of the Jones Act featherweight standard of causation. Evans is entitled to recover for his orthopedic injuries, an award of damages conceded by the shipowner. We will therefore affirm the judgment and order of the district court awarding Evans damages only for his orthopedic injury, lost earnings, and pain and suffering resulting therefrom.

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flow from the court's ruling on Jones Act status. Evans and shipowner do not raise any issue with damages for orthopedic injuries, the only damages awarded.

Brief for Appellee/Cross-Appellant UASC at 4 (emphasis in original). Thus, no remand on discussion concerning the propriety of those damages is necessary.

NYGAARD, *Circuit Judge*, dissenting.

The majority does not disturb the district court's conclusion that Evans is a Jones Act seaman, but concludes that the court erred by finding that United Arab "employed" Evans. I dissent because I conclude that the district court properly found Evans to be a seaman and employed by United Arab. Thus, he is entitled to coverage under the Jones Act.

I.

By its express terms, the Jones Act provides remedies for sea-based maritime workers and thus covers only "seamen." The Jones Act does not define "seaman." But the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.*, which provides remedies for land-based maritime workers, excludes from its coverage "a master or member of a crew of any vessel." This term is a refinement of "seaman" in the Jones Act. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 111 S.Ct. 807, 813 (1991). "Thus, it is odd but true that the key requirement for Jones Act coverage now appears in another statute." *Id.*

Traditionally, the elements necessary to determine who is a "seaman" have been " '(a) that the ship be in navigation; (b) that there be a more or less permanent connection with the ship; and (c) that the worker be aboard primarily to aid in navigation.' " *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 36 (3d Cir. 1975), quoting Martin Norris, The Law of Seaman § 668, at 301 (3d ed. 1970). The Supreme Court has since eliminated the last requirement, holding that it "is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel . . . ." *Wilander*, 111 S.Ct. at 817.

Although it is undisputed that the M/V AL WATTYAH was in navigation, the parties dispute whether Evans was "more or less permanent[ly] connect[ed]" to the vessel. The majority does not resolve this issue, believing it is unclear how the "permanent connection" factor applies to a pilot, who is not permanently connected to any vessel in the temporal sense but who nonetheless performs the core

navigational functions of a seaman and unquestionably is essential to the ship's mission. The confusion arises because it is difficult to define the nature of the required connection between the worker and the vessel: that is, does a "permanent connection" mean a lasting temporal relationship with the particular vessel, or something else?

In *Mach v. Pennsylvania R.R. Co.*, 317 F.2d 761 (3d Cir. 1963), coal transported from barges under tow had to be loaded onto railway cars. Because the barges were not self-propelled, when a towing vessel released a barge, a bargeman hired by the railway took control of it. "In brief, all the handling and attending of barges, from the time a tow boat releases its flotilla, through the unloading, until the time when the empty barges are towed away, is done by the bargeman." *Id.* at 762-63. The issue was whether a bargeman under these circumstances was a "seaman." We held he was, reasoning:

> The work of causing a boat to move in navigable water is the most fundamental and characteristic function of a ship's crew. From the release of loaded barges from their tow until the departure of empty barges under tow, all of the ship's service which a barge required was performed by bargemen who took the place of whatever crew handled them during their journeys up and down the river.
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> The duration of service for and upon a vessel may determine whether shipboard work which is not normally performed by a ship's company makes the worker a crewman, *but lack of long continued attachment to the vessel cannot, as a matter of law, serve to deny seaman's status under the Jones Act to an employee who is injured while assigned to and performing normal crew service.*

Id. at 763-64 (emphasis added).

In *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), we held that a worker who was temporarily assigned to work on barges and whose only contact with ships amounted to fewer than four of the seventy-four days

he had been employed, was not a seaman. In distinguishing *Mach*, we opined that "the bargeman in *Mach* was permanently assigned to work at the river landing where he performed a substantial amount of his work time on the barges, which duties involved significant navigational functions, and who was injured while moving a loaded barge." *Id.* at 38. Thus, under Third Circuit law the permanent connection factor is not a temporal relationship with any particular ship, but is employment-related and focuses instead on the nature of the worker's duties as they relate to the ship and the ship's mission at the time of the injury. Our case law is consistent with traditional maritime law and the Jones Act.

The Supreme Court noted that traditional seamen's remedies have been universally recognized as growing out of " 'the special hazards and disadvantages to which they who go down to the sea in ships are subjected.' " *Wilander*, 111 S.Ct. at 817, quoting *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 104, 66 S.Ct. 872, 882 (1946) (Stone, C.J., dissenting). "All who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed." *Id.* Pilots, no less and perhaps more than any other member of a crew, are subjected to the perils of the sea. See *Bach v. Trident Steamship Co., Inc.*, 920 F.2d 322, 330 (5th Cir. 1991) (Brown, J., dissenting) ("Navigation in and out of ports and harbors, and within restricted waters, poses special hazards that are not presented when sailing on the high seas."). By enacting the LHWCA and the Jones Act, Congress distinguished between land-based and sea-based employment and provided remedies to those who are a "master or member of a crew," and thus facing the special dangers of the sea, and to those who are not. *Wilander*, 111 S.Ct. at 817.

This distinction is the heart of the permanent connection factor because the "key to seaman status is employment-related connection to a vessel in navigation." *Id.* Since "a seaman must be doing the ship's work," that connection shows that the worker is " 'contribut[ing] to the function of the vessel or to the accomplishment of its mission' . . . ." *Id.*, quoting *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th

Cir. 1959). And, since such a job exposes the worker to the particular hazards of the sea, there is no good reason why he should not be covered by the protection of maritime law, statutory as well as decisional. See *The Arizona v. Anelich*, 298 U.S. 110, 123, 56 S.Ct. 707, 711-12 (1936) (Jones Act protects seamen who are wards of admiralty and so must be broadly construed to attain that end). Thus, failing to show a lasting relationship between a worker and a particular vessel does not change either the fact that one doing a ship's work faces all the special dangers of sea-based maritime employment, or that a seaman's status depends on the nature of the worker's duties as they relate to the ship. See *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1412 (9th Cir. 1990) ("the term 'seaman' includes a broad range of marine workers whose work on a vessel on navigable waters contributes to the functioning of the vessel, to accomplishment of its mission, or to its operation or welfare"). See also 46 U.S.C. § 10101(3) ("seaman" means an individual "engaged or employed in any capacity on board a vessel").

No one disputes that Evans was injured in the course of successfully navigating the M/V AL WATTYAH. *Evans v. United Arab Shipping Co.*, 767 F.Supp. 1284, 1285 (D.N.J. 1991). Because he contributed to the function of the vessel and to the accomplishment of its mission, he was a seaman; and merely because he was not connected to the vessel in a long-term temporal sense cannot, as a matter of law, take away his rights under the Jones Act. *Mach*, 317 F.2d at 763-64.

II.

A plaintiff must also show an employment connection with the defendant. *Matute v. Lloyd Bermuda Lines, Ltd.*, 931 F.2d 231, 236 (3d Cir. 1991). After a bench trial, the district court specifically found that United Arab "*employed* Mr. Evans through the services of the Pilot's Association, an organization of river pilots in the area." *Evans*, 767 F.Supp. at 1291 (emphasis added). The majority believes that the court clearly erred in making this finding.

The question of whether a defendant is an employer for the purposes of the Jones Act is normally a factual one

within the province of the fact-finder. *Welsh v. Utah Dredging Co.*, 403 F.2d 217 (3d Cir. 1968); *Wheatley v. Gladden*, 660 F.2d 1024, 1026 (4th Cir. 1981); *The Norland*, 101 F.2d 967, 973 (9th Cir. 1939). Thus, the fact-finder's determination should not be disturbed if there is a rational evidentiary basis for its conclusion.

General rules of agency may help to determine if an employment relationship exists. One must remember, however, that the Jones Act is a remedial legislation extending to seamen the rights accorded railway workers under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* It benefits and protects seamen who are peculiarly the wards of admiralty, and so it must be liberally construed to attain that end. *The Arizona*, 56 S.Ct. at 711-12, citing *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 375, 53 S.Ct. 173, 175 (1932); *Jamison v. Encarnacion*, 281 U.S. 635, 639, 50 S.Ct. 440 (1930); *Alpha S.S. Corp. v. Cain*, 281 U.S. 642, 50 S.Ct. 443 (1930); *Warner v. Goltra*, 293 U.S. 155, 157, 55 S.Ct. 46 (1934). "Congress intended that the purposes of [FELA and the Jones Act] should not be restricted by common-law concepts of control so as to bar from welfare legislation as independent contractors persons who were as a matter of economic reality a part of the processes and dependent upon the businesses to which they rendered service." *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 69 S.Ct. 1317, 1321 (1949). Thus, "the word 'employment' should be construed so as to give protection to seamen for torts committed against them by those standing in the proximate relation of employer, and the rules of private agency should not be rigorously applied." *Id.*, 69 S.Ct. at 1321. Rather, courts should construe "employment" in "the broadest lines or definitions of employment or employer." *Id.*

With this in mind, I cannot agree with the majority's conclusion that the district court erred by finding that Evans was employed by United Arab. I conclude there is sufficient evidence to support this finding. It is undisputed that United Arab paid money for Evans' services. Indeed, Delaware law gives a pilot a cause of action for wages against the shipowner. Del. Stat. Ann. tit. 23 § 121 (1987).

By the plain meaning of "employment," Evans was engaged in the services of United Arab.

Moreover, although control is said to be the most important factor in determining whether the plaintiff is an employee of the defendant, *United States v. W. M. Webb, Inc.*, 397 U.S. 179, 90 S.Ct. 850, 856 (1970), it is not significant in determining whether a pilot is an employee because "a pilot, so far as respects the navigation of the vessel in that part of the voyage which is his pilotage-ground, is *the temporary master* charged with the safety of the vessel and cargo, and of the lives of those on board, and intrusted with the command of the crew." *Cooley v. Board of Wardens*, 53 U.S. 299, 316 (1851) (emphasis added). There is no question that a master is covered under the Jones Act. *Warner v. Goltra*, 293 U.S. 155, 55 S.Ct. 46, 48 (1934). Thus, although a master, as the agent and representative of the shipowner, controls the ship's crew, it cannot be said that the shipowner controls the master in the daily, nautical routines and functions of the ship. Nor should one expect to conclude that a pilot, who is the only person with specialized skills and knowledge necessary to navigate ships in unfamiliar waters, is controlled in his employment by the shipowner.

"The services of the pilot are as much for the benefit of the vessel and cargo as those of the captain and crew. His compensation comes from the same source as theirs. Like them he serves the owner and is paid by the owner. If there be any default on his part, the owner has the same remedies against him as against other delinquents on board. The difference between his relations and those of the master is one rather of form than substance." *The China*, 74 U.S. 53, 67 (1868).

I believe that the district court, as a trier-of-fact, did not err when it found that Evans was "employed," in either the plain or liberal sense of that term, by United Arab. Furthermore, even if, as the majority asserts, the district court "appeared to confuse the in navigation prong of seaman test [which requires an employment-related connection to the vessel] with the additional requirement" that there be an employment connection with the defendant, I would not decide the issue as a matter of law

on appeal, but would remand for the district court to consider the issue in the first instance. See *Matute*, 931 F.2d at 236 (in Jones Act cases "existence of an employer-employee relationship is a question of fact"); Martin Norris, *The Law of Seamen*, § 30:14 at 369 & nn. 70-71 (4th ed. 1985) (determination of whether an employment relationship exists is a question of fact and should be left for the trier-of-fact to decide) (collecting cases).

III.

Because Evans is a Jones Act seaman and was employed by United Arab, he is entitled to coverage under the Jones Act. He is thus entitled to the Jones Act's "featherweight" causation standard, under which the district court concluded that United Arab's negligence aggravated his preexisting neurological condition. It is then incumbent upon United Arab, the proven tortfeasor, rather than Evans, the innocent plaintiff, to show that damages can be segregated.[1] Because the district court erroneously placed this burden on Evans, I would reverse and remand for further proceedings.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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1. "[W]hen a plaintiff has a preexisting condition that would inevitably worsen . . . the burden of proof in such cases is upon the defendant to prove the extent of the damages that the preexisting condition would inevitably have caused." *Maurer v. United States*, 668 F.2d 98 (2d Cir. 1981). See Restatement (Second) of Torts § 433B, comment d (1965) ("As between the proved tortfeasor who has clearly caused some harm, and the entirely innocent plaintiff, any hardship due to lack of evidence as to the extent of the harm caused should fall upon the former.").

WILLIAM W. EVANS,

Plaintiff,

v.

UNITED ARAB SHIPPING COMPANY (S.A.G.) and M/V AL WATTYAH, her engines, boilers, equipment, etc.,

Defendants.

Civ. No. 89-5246(SSB).

United States District Court,
D. New Jersey.
July 30, 1991.

FINDINGS OF FACT and CONCLUSIONS OF LAW

BROTMAN, District Judge:

In reaching its findings of fact and conclusions of law in this maritime suit for negligence, the court must confront an issue explicitly left open by the Supreme Court's recent decision in *McDermott Internation, Inc. v. Wilander,* ___ U.S. ___ , 111 S. Ct. 807, 112 L.Ed.2d 866 (1991): whether a river pilot who is not permanently attached to a ship is a Jones Act seaman. Because the court finds that a river pilot was a seaman under general maritime law at the time Congress passed the Jones Act in 1920, it concludes that this plaintiff is entitled to the protection afforded by that Act.

JURISDICTION

This is an admiralty and maritime claim by the plaintiff for personal injuries against the defendant, which is a sovereign owned shipping company. Jurisdiction is based on 28 U.S.C. § 1333 and the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330. This court held a nonjury bench trial on March 4-7, 1991.

FINDINGS OF FACT

1. Plaintiff, William W. Evans, was at all times material to the events leading up to this suit licensed as a first class pilot by the state of Delaware, Board of Pilot Commissioners, and the United States Coast Guard and was a member of the Pilot's Association for the Bay and River Delaware. Mr. Evans has performed his entire career (over forty years) as a licensed pilot hired to steer ships through the Delaware River and Bay and the Chesapeake and Delaware (C & D) Canal.

2. Defendant, United Arab Shipping Company (UASC), owns and operates the container freight M/V AL WATTYAH. UASC is owned by the governments of Saudi Arabia, Kuwait, Iraq, United Arab Emirates, Bahrain and Qatar. The M/V AL WATTYAH is a diesel-powered vessel of 20,526 tons, 183.24 meters in length, 27.49 meters in beam and 10.015 meters in depth.

3. On the night of September 9-10, 1989, Mr. Evans was on call at the pilot station at Lewes, Delaware. At approximately 1:00 a.m., he was called to pilot the M/V AL WATTYAH toward the C & D Canal as far as Chesapeake City, Maryland, where a Maryland pilot would take over the helm. At approximately 2:00 a.m., Mr. Evans was taken by pilot to launch to the ship, which was situated in the pilotage area between Cape May and Cape Henlopen; he boarded the ship by pilot ladder, also known as a Jacob's ladder, which is a rope ladder with wooden rungs. Mr. Evans experienced difficulty with the pilot ladder due to its poor condition. He then assumed the "conn" of the vessel at approximately 2:30 a.m. and, without incident, piloted the ship toward the Maryland border in clear and calm weather.

4. Upon approaching the point where the Maryland pilot would be boarding, Mr. Evans requested the master of the vessel to have the starboard side accommodation ladder rigged to allow his disembarkation; plaintiff wanted to avoid using the faulty pilot ladder. An accommodation ladder is used in calm waters on ships without

excessive freeboard. It is a staircase built of galvanized steel or aluminum that is attached at its top to the main deck of the vessel and is lowered by means of a winch to within a few feet of the water's surface. At the lower end is a platform that can be adjusted, depending on the height of the vessel's freeboard and the ladder's angle of suspension, to remain parallel with the water's surface. This lower platform is fixed in position after adjustment by means of a pin which passes through an intersecting "sandwich" of metal bars and holds it rigidly in place.

The accommodation ladder is also equipped with handrails that are designed to fold back along the channels of the ladder by means of pivoting stanchions. When the ladder is fully extended, the stanchions are designed to pivot upright and then be secured with chains or ropes.

5. The Maryland pilot was transported to the M/V AL WATTYAH by the pilot launch at Chesapeake City, which was driven by John Stringer. When the launch was in position alongside the ship, the Maryland pilot stepped from the foredeck of the launch directly on to the lower-most rung of the accommodation ladder, stepping over the lower platform. Transcript of March 4 at 38-41 (testimony of Stringer).

6. Some minutes later, a seaman headed down the accommodation ladder to deliver Mr. Evans' briefcase and to assist him in leaving the ship. As the seaman stepped on the lower platform it pivoted on its axle and dropped, causing the sailor to fall. The seaman was able to hoist himself aboard the launch, then examined the lower platform on hands and knees. According to Stringer, he appeared to be reaching for something and adjusting the underside of the lower platform. Transcript of March 4 at 42.

7. At this time, Mr. Evans appeared at the upper platform of the accommodation ladder and saw that the sailor was on his hands and knees adjusting the lower platform. Mr. Evans asked the two officers who had accompanied him to the ladder what the sailor was doing

and whether it was safe to use the ladder. Neither officer responded with anything more than a shrug of the shoulders. Evans Deposition at 87-88. Mr. Evans then shouted down to the sailor, who by this time was on his feet facing up the ladder with one hand on the ladder's handrail and the other on the launch's bow rail. The seaman made no gesture or sign to Mr. Evans other than to make direct eye contact, which he understood as an indication that the ladder was safe; he then began his descent. On his way down he noticed a pile of rope in disarray on the lower platform.

8. When Mr. Evans reached the lower-most rung of the ladder with his left foot, he placed his right foot on to the lower platform and released his hand from the inboard handrail. He then began to swing his left leg over to the deck of the launch but when he transferred his weight to his right leg, the platform dropped, pivoting on its axle. Mr. Evans then attempted to prevent himself from falling between the ship and launch by shifting his weight to the outboard handrail. This handrail collapsed, however, and Mr. Evans' body swung in a 270 degree turn. His tailbone (coccyx) hit the deck of the launch and his face and left rib cage struck the outboard channel of the accommodation ladder. Evans Deposition at 46-53. The sailor then assisted Mr. Evans on to the launch.

9. Plaintiff's version of this event was unrebutted at trial and was corroborated in significant detail by Mr. Stringer, the launch driver, who witnessed the entire incident. Although he did not actually see the platform collapse, both times he heard a "clang" sound and he saw Mr. Evans fall. March 4 Transcript at 43-45. When Mr. Evans entered the launch's cabin, Mr. Stringer said, "The same exact thing happened to that crewman." Evans Deposition at 54. He also observed that Mr. Evans appeared visibly shaken and pale, and did not assist, as was his custom, with the handling of mooring lines upon reaching the dock. Transcript of March 3 at 45-46. Mr.

Evans took a taxicab to his car, then drove himself home and went to sleep.

10. Mr. Evans was experiencing pain in his nose, ribs and tailbone. When he arose the morning of September 11, he blew his nose and "blood just gushed out." Evans Deposition at 63. He immediately contacted his family physician, Dr. Bell, who had x-rays taken of his spine, ribs and nose. The x-rays revealed that Mr. Evans had suffered a fractured nose; plaintiff claims that he also suffered a fractured coccyx and a possible fractured rib but was unable to present any corroborating evidence to that effect.

11. Mr. Evans was on medical leave from his piloting duties for an extended period of time. There was some factual dispute at trial as to the amount of time that passed before Mr. Evans was able to recover sufficiently from his orthopedic injuries to return to work. The Pilot Association's logbook indicates that Mr. Evans next piloted a ship on October 26, 42 days after the accident on the M/V AL WATTYAH. However, Mr. Evans had to wait several days between the time he informed the dispatcher that he has available for work and his first assignment. March 6 Transcript at 31-32. Therefore, the court concludes, Mr. Evans' orthopedic injuries caused him to miss 38 days of work.

12. Within one or two days after the September 10 accident, Mr. Evans and his wife each noticed for the first time a distinct slurring of his speech and a pronounced weakness or lack of balance in his gait. He immediately sought medical attention for these symptoms and was referred to a specialist in neurology. Unfortunately, however, Mr. Evans' speech and balance problems increased to such an extent that, when he returned to piloting on October 26, numerous complaints were registered about the hazards presented by his condition. At the request of the Association's president and upon the advice of his doctors, Mr. Evans took a medical leave of absence beginning November 10, 1989. In June, 1990, he was unable to pass the physical

exam he needed to renew his state pilot's license, which expired on September 1, 1990. He has not piloted a boat since November 10, 1989.

Since the first symptoms of plaintiff's neurological condition appeared, there has been a steady deterioration in his ability to speak and walk. Mr. Evans has fallen several times, fracturing his hip and wrist, and is expected to be wheelchairbound shortly. At trial, Mr. Evans walked with the assistance of a walker and his speech was dramatically slurred. His doctors predict that he will die within one or two years; however, if he elects to use artificial respiratory and nutritional devices, and with the assistance of 24-hour residential nursing care, he could prolong his life another year or two beyond that time.

13. A professional associate of the plaintiff, pilot George Mcintire, was with him for a full week in early July, 1989 at a ship handling school in Grenoble, France. According to Mcintire, who was with him during that entire week, plaintiff appeared healthy and vigorous at all times; they took long walks together each evening and he participated fully in the school's curriculum. No signs of any neurological problems were evident.

14. Dr. Cook, Mr. Evans' medical expert in neurology and treating neurologist, noted on January 16, 1990 that "prefall," *i.e.,* before the September 10 accident on the AL WATTYAH, plaintiff said his legs were tired and his balance was off. March 5 Transcript at 32-33. Dr. Bhatt, plaintiff's other treating neurologist, similarly testified that at plaintiff's examination on October 4, 1989, he had complained of difficulty walking and with balance "for the last few months." March 7 Transcript at 24.

15. No doctor has been able to provide a definitive diagnosis of Mr. Evans' neurological condition. Dr. Cook described it as an unusual genus of motor neuron disease that resembles amyotrophic lateral sclerosis (ALS), also known as Lou Gehrig's disease. He also

testified that Mr. Evans' disease probably pre-existed the fall but laid dormant. Defendant's medical expert, Dr. Duvoisin, submitted a pretrial report stating that plaintiff's symptoms resembled olivopontocerebellar atrophy and Parkinsonism, and ultimately described it as a chronic progressive diffuse neurodegenerative disorder. Defendant's Exhibit 1B. At trial, Dr. Duvoisin said that plaintiff probably had a nerve degeneration problem similar to ALS.

16. The state of medical knowledge as to the causation of motor neuron disease like that present in Mr. Evans is similarly imprecise. Dr. Cook stated outright that "[w]e don't really know what causes motor neuron disease or ALS." March 5 Transcript at 18. Dr. Cook testified that there is anecdotal evidence in the medical literature that trauma is a causative factor of the disease. It was his opinion that it was "likely" or "possible" that plaintiff's pre-existent motor disease was aggravated by the traumatic event on September 10. However, he could not say that it was "probable."

Dr. Duvoisin categorically ruled out trauma as playing any causative role in plaintiff's neurological problems. March 7 Transcript at 34-35. Dr. Duvoisin described his research as exclusively directed toward finding a genetic link to the disease. On cross-examination, he was presented with four research articles listing trauma as one possible cause of the disease but dismissed them as not convincing. Ultimately, he conceded that he would not conclusively rule trauma out as a causative factor, though he considered it so improbable as to be "philosophically meaningless." March 7 Transcript at 42.

CONCLUSIONS OF LAW

A. *Evans' Status as a Jones Act Seaman*

The threshold question before the court is whether Mr. Evans, as a river pilot, is a "seaman" and therefore entitled to the protection of the Merchant Marine Act of 1920, otherwise known as the Jones Act, 46 U.S.C.App. § 688. As we shall see, the answer is "of paramount importance" to the outcome of plaintiff's case, since "the seaman's remedies are far more favorable than those available to other maritime workers." Robertson, *A New Approach to Determining Seaman Status,* 64 Tex. L.Rev. 79, 83 (1985).

Defendant argues that plaintiff cannot possibly meet the traditional common law requirement that a Jones Act seaman be permanently assigned to defendant's vessel or perform a substantial amount of his work aboard it. *See Bach v. Trident Steamship Co.,* 920 F.2d 322 (5th Cir.1991) (river pilot is not a Jones Act seaman because not permanently attached to a vessel or fleet of vessels); *King v. Universal Electric Construction Co.,* 799 F.2d 1073 (5th Cir.1986). This court's reading of the cases supporting defendant's argument would compel it to agree. *See, e.g., Griffith v. Wheeling Pittsburgh Steel Corp.,* 521 F.2d 31 (3d Cir.1975), *cert. denied,* 423 U.S. 1054, 96 S.Ct. 785, 46 L.Ed.2d 643 (1976); *Clark v. Solomon Navigation, Ltd.,* 631 F.Supp. 1275 (S.D.N.Y.1986). Plaintiff argues that the Supreme Court's recent decision in *McDermott* leads to the inevitable conclusion that the "permanent attachment" element of seaman status is no longer required; it is enough that plaintiff was employed to assist in the performance of the vessel's functions. In addition, the court notes that reliance on the Fifth Circuit's decision in *Bach* would be dangerous in light of the Supreme Court's recent decision to remand *Bach* "for further consideration in light of *McDermott.*" ___ U.S. ___ , 111 S.Ct. 2253, 114 L.Ed.2d 706 (1991).

The court's inquiry, of course, must begin with the Supreme Court's unanimous decision in *McDermott*, ___ U.S. ___ , 111 S.Ct. 807, 112 L.Ed.2d 866 (1991).[1] The question before the Court on that occasion was whether a paint foreman, who did not aid in a ship's navigation, nevertheless qualified as a seaman under the Jones Act. The Court answered this question in the affirmative by jettisoning the aid in navigation requirement. Since the Jones Act does not define who a seaman is,[2] the Court assumed that Congress intended to use the term in the same way that other admiralty courts had used it. *Id.* at 811. The Court's first task, therefore, was to determine who was a seaman under the general maritime law when Congress passed the Jones Act. *Id.*

The Court then conducted an in-depth analysis of the historical bases of the maritime worker's negligence suit against the ship's owner and found that a great variety of shipworkers were considered seamen at the

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1. As the Supreme Court acknowledged in *McDermott*, its precedents in this area "led the lower courts to a 'myriad of standards and lack of uniformity in administering the elements of seamen status.' " *Id.*, 111 S.Ct. at 816, *quoting* Engerrand & Bale, *Seaman Status Reconsidered*, 24 S.Tex.L.J. 431, 494 (1983).

2. The only definition of "seaman" provided by Congress is found at 46 U.S.C. § 10101, which states: (3) "seaman means an individual (except scientific personnel, a sailing school instructor or a sailing student) engaged or employed in any capacity on board a vessel." This provision was enacted in 1983 as part of Congress' effort "to revise, consolidate and enact certain laws related to vessels and seaman as subtitle II of title 46, United States Code." H.R.Rep. No. 338, 98th Cong., 1st Sess. 1, *reprinted in* 1983 U.S.Code Cong. & Admin. News 924, 924. The definition of seaman is found at "Part G—Merchant Seaman Protection and Relief" and the legislative history indicates merely that "Section 10101 defines the terms master, seaman, and owner as they apply to merchant seamen's protection and relief." H.R.Rep. No. 338, 1983 Code Cong. & Admin. News at 1004. This definition, however, had its genesis in Act of Dec. 21, 1898. c. 28 §§ 23, 26, R.S. § 4612 (30 Stat. 762, 764) and was derived from Act of June 7, 1872, c. 322, § 65, 17 Stat. 277.

The court notes that this definition contains no requirement that a seaman have a permanent connection to a vessel.

time the Jones Act was passed. The Court, however, gave only limited guidance on the applicability of other common law requirements of seaman status, stating:

> The key to seaman status is employment-related connection to a vessel in navigation. We are not called upon here to define this connection in all details, but we hold that a necessary element of the connection is that a seaman perform the work of a vessel. See *Maryland Casualty Co. v. Lawson,* 94 F.2d 190, 192 (CA5 1938) ("There is implied a definite and permanent connection with the vessel, an obligation to forward her enterprise"), cited approvingly in *Norton,* [*v. Warner Co.*] 321 U.S. [565] at 573, 64 S.Ct. [747] at 751 [88 L.Ed. 931 (1944)]. In this regard, we believe the requirement that an employee's duties must "contribut[e] to the function of the vessel or to the accomplishment of its mission" captures well an important requirement of seaman status.

Id. at 817.

This court, therefore, must fill in the gap left by *McDermott* and reach the appropriate definition of seaman as applied to a river pilot who has no permanent connection to any one ship yet whose only duties place him at the most important post on the ship—the ship's helm. It does so, however, not without guidance. As explained above, the Court instructed lower courts to determine who is a seaman by examining general maritime law at the time Congress passed the Jones Act. *Id.* at 811.

In fact, the *McDermott* decision itself answers the question whether a river pilot was a seaman under general maritime law in 1920. Although endeavoring to determine the propriety of the "aid in navigation" test, the Court noted that pilots were considered seamen as early as 1832, when Justice Story wrote: "A cook and steward are seamen in the sense of the maritime law, although they have peculiar duties assigned them. *So a pilot,* a surgeon, a ship-carpenter, and a boatswain, are

deemed seamen, entitled to sue in admiralty." *Id., quoting United States v. Thompson,* 28 F.Cas. 102 (No. 16,492) (CCD Mass.1832) (emphasis supplied). The *McDermott* Court also observed that "[b]y the middle of the 19th century, the leading admiralty treatise noted the wide variety of those eligible for seamen's benefits: "Master, mates, sailors . . . pilots . . . women as well as men,—are mariners.' " *Id., quoting* E. Benedict, The American Admiralty § 278, p. 158 (1850).

This court's own research lends further support to this conclusion. In a series of cases concerning the states' power to regulate pilots and pilotage in ports and harbors, the Supreme Court wrote of this class of mariners that they were as much a part of the commercial marine as the hull of the ship and the helm by which it is guided . . . Pilots are a meritorious class, and the service in which they are engaged is one of great importance to the public. It is frequently full of hardship, and sometimes of peril; night and day, in winter and summer, in tempest and calm, they must be present at their proper places and ready to perform the duties of their vocation.

Ex parte McNiel, 80 U.S. (13 Wall.) 236, 237-38, 20 L.Ed. 624 (1871). In *The China,* the Supreme Court noted that statutes requiring ships to hire pilots were beneficial "by providing a body of trained and skillful *seamen,* at all times ready for the service, holding out to them sufficient inducements . . . to pursue a business attended with so much of peril and hardship." 74 U.S. (7 Wall.) 53, 67, 19 L.Ed. 67 (1868). *See also The Alameda v. Neal,* 32 F. 331 (CC NDCal 1887) (object of pilotage fees "was to create a body of hardy and skillful seaman, thoroughly acquainted with the harbor, to pilot vessels seeking to enter or depart from the port"). In another case, the Supreme Court observed no significant difference between pilots who accompany a ship on a voyage and those local or port pilots "whose employment lasts but a few hours, and who have no connection with any vessel except to bring into or take it out of port. The term

pilots is equally applicable to [both] classes of persons. . . ." *Steamship Company v. Joliffe,* 69 U.S. (2 Wall.) 450, 461-62, 17 L.Ed. 805 (1864).

Lower courts that were faced with deciding whether pilots were protected under the general maritime law came to the same conclusion. Thus, in *The Mary Elizabeth,* the Circuit Court in the Southern District of Alabama, declared that "[a] pilot, being a person employed in the navigation of a vessel, is deemed a seaman, and his claim for wages is within the admiralty jurisdiction." 24 F. 397 (CC SDAla 1885). And in *Wilson v. The Ohio,* the court held that a pilot on a steamboat navigating the river Delaware is entitled to sue in admiralty for his wages. 30 F.Cas. 149, 150 (Case No. 17, 825) (E.D.Pa.1834). Finally, in yet another case from this Circuit, the court assumed that a pilot of a steam vessel, who is a licensed and sworn officer, is a seaman. *The Lud Keefer, Werling v. The Lud Keefer,* 51 F. 44 (3d Cir. 1892).

This court, as did the Supreme Court in *McDermott,* must also consider the importance of the Longshore and Harbor Workers' Compensation Act (LHWCA), 44 Stat. (part 2) 1424, as amended, 33 U.S.C. §§ 901-950 in defining a Jones Act seaman. As the Court wrote:

> The LHWCA provides relief for land-based maritime workers, and the Jones Act is restricted to "a master or member of a crew of the vessel" . . . [which] is a refinement of the term "seaman" in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act. Thus it is odd but true that the key requirement for Jones Act coverage now appears in another statute.

McDermott, 111 S.Ct. at 813. Thus, the term "master or member of a crew," which is used in the LHWCA to exclude coverage, is identical to the term "seaman" for Jones Act purposes. According to the Court, both terms refer to "a sea-based maritime employee." *Id.* at 814.

[1] In 1927, shortly after its passage, the federal agency charged with enforcing the LHWCA issued a definitive ruling that a river pilot is a master or member of a crew and, therefore, excluded from LHWCA coverage. *Longshoremen's Act, Opinion #22,* 1928 AMC 263 (U.S. Employee's Comp.Comm.1927). The Commission, after examining various court pronouncements on the duties of pilots, concluded that "the pilot merely takes over for the time being some of the duties pertaining to navigation which devolve upon the master." *Id.* at 264. Significantly for this case, the Commission placed a river pilot within the class of master or member of the crew despite his temporary attachment to the vessel. This court must accord substantial weight to the Commission's conclusion, for the Supreme Court has held that its findings, if there is evidence to support them, are "conclusive." *South Chicago Coal & Dock Co. v. Bassett,* 309 U.S. 251, 257-58, 60 S.Ct. 544, 547-48, 84 L.Ed. 732 (1940). This court's own conclusion must be that a river pilot is a master or member of a crew and, therefore, is a Jones Act seaman.

Notably, Judge Brown reached the same conclusion in his powerful and persuasive dissent in *Bach v. Trident,* 920 F.2d at 327-33. Quoting from the ancient admiralty codes, pointing out the broad sweep of Supreme Court precedent and citing congressional activity in this area, Judge Brown recognized that the safe conduct of a vessel's mission could not be accomplished without the pilot; he is "indispensable." "The vessel may not operate without him/her. That pilot is in supreme command of the basic function of the vessel—to navigate in maritime commerce. That person is a seaman or he/she is nothing." *Id.* at 333. This court believes that the Supreme Court would also so find.

From this legal conclusion, the court must determine if this plaintiff is a seaman. As the Supreme Court noted in *McDermott,* this question is best characterized as a mixed question of law and fact. 111 S.Ct. at 818. Since this court sits as the factfinder in this nonjury

case, it must find the facts and apply the legal standard to those facts.

It is undisputed that Mr. Evans' entire career was spent as a river pilot and that on the morning of September 10, 1989, he was acting in that capacity aboard the M/V AL WATTYAH when the accident occurred. The ship's owner employed Mr. Evans through the services of the Pilot's Association, an organization of river pilots in the area. Therefore, he had that "employment-related connection" essential to determining seaman status. It is also undisputed that Mr. Evans' work on the M/V AL WATTYAH contributed to the function and mission of the ship. It can fairly be said that plaintiff's job required him to confront the perils and hazards of the sea that any other member of the ship's crew faces on a daily basis. Mr. Evans, therefore, is entitled to the protection of the Jones Act.

B. *Negligence and Causation*

Under the Jones Act, the employer, by its officers and crew, owes the plaintiff the obligation to exercise ordinary reasonable care for his safety. "A ship must provide a safe place to work to a seaman, or one who performs tasks traditionally performed by a ship's crew; that duty encompasses a reasonably safe means of boarding, and departing from the vessel, and failure to discharge it constitutes negligence." *Southard v. Independent Towing Co.*, 453 F.2d 1115, 1118 (3d Cir.1971). A seaman may also recover for his injuries caused by any defect or insufficiency in equipment due to the ship owner's negligence. 46 U.S.C. § 688, incorporating by reference 45 U.S.C. § 51 (the Federal Employers' Liability Act (FELA)). The Supreme Court has instructed the lower courts to interpret the term liberally "so as to include all the meanings given to it in the light of the peculiar hazards of the seafaring profession." Norris, The Law of Seaman § 690, p. 374-75 (1970); *see also Johnson v. Offshore Exp., Inc.*, 845 F.2d 1347, 1352 (5th

Cir.1988), *cert. denied,* 488 U.S. 968, 109 S.Ct. 497, 102 L.Ed.2d 533 ("[e]vidence of the 'slightest' negligence is sufficient").

[2] If the duty owed to the seaman is breached, plaintiff must show only that the breach " 'played any part, even the slightest, in producing the injury or death for which damages are sought.' " *Ferguson v. Moore-McCormack Lines,* 352 U.S. 521, 523, 77 S.Ct. 457, 458, 1 L.Ed.2d 511 (1957) (Jones Act case), *quoting Rogers v. Missouri Pacific R. Co.,* 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957) (FELA case); *Smith v. Trans-World Drilling Co.,* 772 F.2d 157, 162 (5th Cir.1985) ("Jones Act negligence is a legally sufficient cause of injury if it played any part, no matter how small, in bringing about the injury"); *Southard,* 453 F.2d at 1118. The Fifth Circuit has described this standard of causation as "featherweight." *Smith, supra;* Gilmore and Black, The Law of Admiralty (2d ed.) at 377.

The liberal standards of negligence and legal causation fashioned by the courts in Jones Act and FELA cases are equally applicable where testimony from medical experts fails to establish anything like a definitive answer on the question of what caused plaintiff's injury. In the leading case on this issue, *Sentilles v. Inter-Caribbean Corp.,* 361 U.S. 107, 80 S.Ct. 173, 4 L.Ed.2d 142 (1959), the Supreme Court examined the case of a seaman suing under the Jones Act. The seaman had been thrown some distance when the ship pitched in heavy seas. Shortly after the accident, he became very ill and was treated for a serious case of tuberculosis. At trial, plaintiff sought to prove that the accident activated or aggravated a previously latent tubercular condition, though no medical expert could say that the accident in fact caused plaintiff's condition. The Supreme Court affirmed the jury's finding of liability, stating:

> The Jury's power to draw the inference that the aggravation of petitioner's tubercular condition, evident so shortly after the accident, was in fact

> caused by that accident, was not impaired by the failure of any medical witness to testify that it was in fact the cause. Neither can it be impaired by the lack of medical unanimity as to the respective likelihood of the potential causes of the aggravation, or by the fact that other potential causes of the aggravation existed and were not conclusively negated by the proofs. The matter does not turn on the use of a particular form of words by the physicians in giving their testimony. The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation. They were entitled to take all the circumstances, including the medical testimony, into consideration.

Id. at 109-10, 80 S.Ct. at 175-76 (footnote omitted). The Court also noted the general reluctance among experts to state that trauma was the cause of a disease. *Id.* at 109 n. 2, 80 S.Ct.; at 175 n. 2

The Third Circuit has just recently reiterated that the concept of causation in FELA, and thus Jones Act, cases is "broadly interpreted." *Hines v. Consolidated Rail Corp.*, 926 F.2d 262, 268 (3d Cir.1991). In reversing the lower court's grant of summary judgment in favor of the employer, the Third Circuit compared its holding in *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829 (3d Cir.1990), *cert. denied, General Electric Co. v. Knight*, __ U.S. __, 111 S.Ct. 1584, 113 L.Ed.2d 649 (1991), that medical experts must state their opinions with "reasonable medical certainty," to the more liberal view expressed in *Sentilles*. *Hines* held that "a medical expert can testify that there was more than one potential cause of a plaintiff's condition." *Id.* The court then reaffirmed the Supreme Court's holding in *Sentilles* allowing the jury to draw causal inferences based on varying and inconclusive medical testimony.

[3] Looking at all the evidence presented at trial, the court finds that defendant was negligent in failing to ensure that the accommodation ladder was reasonably

safe for pilot Evan's egress from the ship. Plaintiff's expert in marine surveying, William J. Campbell, stated that it is the responsibility of the officer on the ship to keep the accommodation ladder rigged properly. A properly rigged ladder would have a pin with a lanyard attached, which would be inserted at the lower platform in such a way as to lock it into position. March 4 Transcript at 69-73. The seaman's earlier fall from the platform followed by plaintiff's fall made it apparent to this court's satisfaction that the pin was not inserted properly at either point in time. In addition, the handrail on the outboard side of the ladder was defective in that a stanchion was missing, causing it to collapse when plaintiff put his weight on it. Another example of defendant's negligence is the officer's failure to respond to plaintiff's inquiry about the ladder and to investigate the situation further. It was these acts of defendants negligence that caused Mr. Evans to fall and hit the launch.

[4] As to plaintiff's orthopedic injuries, the court finds that defendant's negligent failure to rig properly the accommodation ladder caused Mr. Evans' immediate injuries: his fractured nose and bruised ribs and coccyx. As to plaintiff's neurological injuries, the court acknowledges that it is a close and difficult question. If this were not a Jones Act case with its attendant "featherweight" standard for proving causation, then this court would find that defendant's negligence did not proximately cause or aggravate plaintiff's neurological injuries. However, this court is bound to apply the law as it now stands.

As an initial matter, the court finds that plaintiff's fall from the ladder did not cause Mr. Evans' motor neuron disease. Testimony from both Dr. Bhatt and Dr. Cook revealed that plaintiff had complained of some tiredness in his legs and balance problems before the accident. The real question is whether the fall aggravated or accelerated a pre-existing but almost completely latent motor neuron dysfunction. Testimony from the medical experts, both fully qualified in the field of

neurology, indicated that there are several potential causes of the type of motor neuron disease from which Mr. Evans suffers. Plaintiff's expert, Dr. Cook, opined that the trauma of the fall "possibly" caused the aggravation of plaintiff's condition, but the etiology of the disease is still not known for certain. Dr. Duvoisin, defendant's expert, dismissed trauma as a possible cause though he did acknowledge that there are researchers in this field who claim that trauma may cause motor neuron disease. From this evidence, the court is left in a grey zone between "maybe" and "probably not." In that situation, the court is inclined to lean more heavily than it would otherwise on the circumstantial evidence in the case as well as general common sense.

The circumstantial evidence was sufficiently probative that the court feels it is reasonable to infer that the manner in which plaintiff fell from the ladder aggravated his neurological symptomology. For example, before the accident, plaintiff was not experiencing any great difficulty in his neurological functions and received no complaints of his performance on the job; one witness observed absolutely no indications of any problem as recently as seven or eight weeks before the fall. When plaintiff fell from the ladder, the full weight of plaintiff's body struck the gunnel of the launch at the base of his spine; in addition, plaintiff struck his face on the ladder with such force as to break his nose. Mr. Evans was obviously traumatized by the event — the pilot of the launch said he looked visibly shaken and pale. Significantly, plaintiff and his wife noticed a distinct change in his ability to speak and walk just one or two days after the accident. Numerous complaints about plaintiff's ability to speak and walk on the job just six weeks after the accident are telling evidence that plaintiff's condition deteriorated substantially in a very short span of time. From all this evidence, plus the fact that medical science has not reached a point where it can rule trauma out as a possible cause of motor neuron

disease, the court concludes that defendant's negligence played a part in aggravating plaintiff's neurological condition.

C. *Damages*

The general rule for measuring damages due to the tortious conduct by a seaman's employer was set forth by this Circuit in *Downie v. United States Line Co.*, 359 F.2d 344, 347-48 (3d Cir.) (in banc), *cert. denied*, 385 U.S. 897, 87 S.Ct. 201, 17 L.Ed.2d 130 (1966), and reiterated in *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453 (3d Cir.1982). There, the court said the plaintiff is entitled to an award of damages commensurate with the nature and extent of his injuries.

> He is entitled to reimbursement for his loss of earnings, past and prospective; for any impairment of his earning capacity; for medical expenses incurred and to be incurred; and for any other economic loss he may have sustained or is likely to sustain. He is also entitled to redress for his physical injury, including the effects thereof, such as pain, suffering, mental anguish; discomfort, and inconvenience. If the injuries are permanent . . . he may recover . . . his probable loss of future earnings. . . . The injured worker is also entitled to compensation, again based on life expectancy at the time of injury, for the physical and mental effects of the injury on his ability to engage those activities which normally contribute to the enjoyment of life. . . .

Pfeifer, 678 F.2d at 460.

[5] In cases like this one, in which an employer's negligence aggravated a pre-existing condition, courts have held that the defendant must compensate plaintiff only for the aggravation itself and not for the pre-existing condition. "The court has only allowed damages for the increased and augmented suffering and disability which was the proximate result of defendant's act." *Scarberry v. Ohio River Co.*, 217 F.Supp. 189, 193 (S.D.W.Va.1963); *Thompson v. Coastal Oil Co.*, 119

F.Supp. 838, 845 (D.N.J.1954) (symptoms of brain damage considered only to the extent that unseaworthy condition aggravated them), *rev'd on other gds.*, 221 F.2d 559 (3d Cir.1955), *rev'd*, 352 U.S. 862, 77 S.Ct. 90, 1 L.Ed.2d 73 (1956); Benedict on Admiralty § 32 at 3-284, 3-285 (1989). *Contra Milos v. Sea-Land Serv., Inc.*, 478 F.Supp 1019 (S.D.N.Y.1979); *Pedersen v. Diesel Tankers, Ira S. Bushey, Inc.*, 280 F.Supp. 421 (S.D.N.Y.1967). Where plaintiff would have experienced the symptoms of his pre-existing condition at some time in the future even if he had not fallen, he can only recover that portion of his damages caused by the aggravating event, and not all damages associated with the pre-existing condition.

[6] After a close review of the record at trial, the court is unable to make an award of damages that would not be completely speculative. The evidence on medical costs, for example, other than for plaintiff's orthopedic injuries, posited recovery of the entire amount necessary until Mr. Evan's death—approximately four years of acute therapy, at-home nursing care and home modifications calculated at over $1.8 million. Another problem is that plaintiff's medical experts did not say precisely how his condition was aggravated by the fall, making it impossible for the court to exercise its own judgment about the appropriate measure of the aggravation. Specifically, the court would want to know approximately when the disease would have rendered plaintiff unable to function normally but for the fall.

So that it may exercise its function properly, the court has determined that it is necessary to open the record so that evidence may be heard on how to measure damages for the aggravation of Mr. Evans' condition. The court is not interested in a repeat of what has already been offered in evidence. Rather, it expects a sufficiently detailed estimate of the increase in plaintiff's suffering, disability and wage loss due to the aggravation of his disease. The parties are hereby directed to submit briefs on this issue, based on admissable evidence.

Submissions shall be delivered to chambers no later than Friday, August 23. If settlement does not occur, and if a hearing is necessary, the court will schedule one accordingly.

ORDER

This admiralty suit having come before the court on a bench trial conducted on March 4-7, 1991; and

The court having considered all the submissions of the parties and the evidence introduced at trial, and for the reasons set forth in its Findings of Facts and Conclusions of Law entered this same date; and

For good cause shown;

IT IS this 30th day of July, 1991 hereby

ORDERED that defendant United Arab Shipping Company is adjudged liable for the negligent conduct of its employees aboard the M/V AL WATTYAH on September 10, 1989 that caused plaintiff's injuries. It is further

ORDERED that the court shall open the record to consider evidence on how to measure the damages for the aggravation of plaintiff's pre-existing neurological condition. Briefs shall be filed with the court no later than Friday, August 23 in accordance with the court's opinion of this date. A hearing, if necessary, will be scheduled accordingly.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-5300, 92-5301, 92-5534 & 92-5535

WILLIAM W. EVANS,
Appellant at Nos. 92-5300 & 92-5534
v.
UNITED ARAB SHIPPING COMPANY S.A.G.;
M/V AL WATTYAH, her engines, boilers, equipment, etc.
UNITED ARAB SHIPPING COMPANY S.A.G.,
Appellant at Nos. 92-5301 & 92-5535

Appeal from the United States District Court
for the District of New Jersey
(D.C. Divil Docket No. 89-05246)

Present: Hutchinson, Nygaard and Seitz, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on February 22, 1993.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered May 4, 1992 as amended by order entered August 26, 1992, be, and the same is hereby affirmed with respect to the award to William W. Evans of damages only for his orthopedic injury, lost earning, and pain and suffering resulting therefrom. Costs taxed against appellants in each appeal. All of the above in accordance with the opinion of this Court.

ATTEST:

P. Douglas Sisk

Clerk

Dated August 13, 1993

Costs taxed in favor of United Arab Shipping Company as follows:

TOTAL COSTS $352.46

Certified as a true copy and issued in lieu of a formal mandate on September 30, 1993.

Teste: P. Douglas Sisk

Clerk, U.S. Court of Appeals for the Third Circuit.

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WILLIAM W. EVANS,
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v.

UNITED ARAB SHIPPING COMPANY S.A.G.;
M/V AL WATTYAH, her engines, boilers, equipment, etc.

UNITED ARAB SHIPPING COMPANY S.A.G.,
Appellant at Nos. 92-5301 & 92-5535

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Docket No. 89-05246)

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS and SETIZ,* *Circuit Judges*

The petition for rehearing filed by appellant William W. Evans in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing,

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* Hon. Collins J. Seitz was limited to voting for panel rehearing.

and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ WILLIAM D. HUTCHINSON
Circuit Judge

DATED: September 22, 1993

Jones Act
46 U.S.C. app. § 688(a)

§ 688. Recovery for injury to or death of seaman

(a) **Application of railway employee statutes; jurisdiction.** Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of peronal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Longshore and Harbor Workers' Compensation Act
33 U.S.C. §§ 902, 903, 905

§ 902. Definitions

When used in this Act—

(1) The term "person" means individual, partnership, corporation, or association.

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

(5) The term "carrier" means any person or fund authorized under section 32 [33 USCS § 932] to insure under this Act and includes selfinsurers.

(6) The term "commission [Secretary]" means the United States Employees' Compensation Commission [Secretary of Labor].

(7) The term "deputy commissioner" means the deputy commissioner having jurisdiction in respect of an injury or death.

(8) The term "State" includes a Territory and the District of Columbia.

(9) The term "United States" when used in a geographical sense means the several States and Territories and the District of Columbia, including the territorial waters thereof.

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(11) "Death" as a basis for a right to compensation means only death resulting from an injury.

(12) "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this Act, and includes funeral benefits provided therein.

(13) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from other than the employer.

(14) "Child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, a child in relation to whom the deceased employee stood in loco parentis for at least one year prior to the time of injury, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee. "Child", "grandchild", "brother", and "sister" include only a person who is under eighteen years of age, or who, though eighteen years of age or over, is (1) wholly dependent upon the employee and incapable of self-support by reason of mental or physical disability, or (2) a student as defined in paragraph (19) [(18)] of this section.

(15) The term "parent" includes step-parents and parents by adoption, parents-in-law, and any person who for more than three years prior to the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee.

(16) The term "widow or widower" includes only the decedent's wife or husband living with or dependent for support upon him or her at the time of his or her death;

or living apart for justifiable cause or by reason of his or her desertion at such time.

(17) The terms "adoption" or "adopted" mean legal adoption prior to the time of the injury.

(18) The term "student" means a person regularly pursuing a full-time course of study or training at an institution which is—

(A) a school or college or university operated or directly supported by the United States, or by any State or local government or political subdivision thereof.

(B) a school or college or university which has been accredited by a State or by a State recognized or nationally recognized accrediting agency or body.

(C) a school or college or university not so accredited but whose credits are accepted on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited, or

(D) an additional type of educational or training institution as defined by the Secretary.

but not after he reaches the age of twenty-three or has completed four years of education beyond the high school level, except that where his twenty-third birthday occurs during a semester or other enrollment period, he shall continue to be considered a student until the end of such semester or other enrollment period. A child shall not be deemed to have ceased to be a student during any interim between school years if the interim does not exceed five months and if he shows to the satisfaction of the Secretary that he has a bona fide intention of continuing to pursue a full-time course of education or training during the semester or other enrollment period immediately following the interim or during periods of reasonable duration during which, in the judgment of the Secretary, he is prevented by factors beyond his

control from pursuing his education. A child shall not be deemed to be a student under this Act during a period of service in the Armed Forces of the United States.

(19) The term "national average weekly wage" means the national average weekly earning of production or nonsupervisory workers on private nonagricultural payrolls.

(20) The term "Board" shall mean the Benefits Review Board.

(21) The term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

(22) The singular includes the plural and the masculine includes the feminine and neuter.

(Mar. 4, 1927, ch 509, § 2, 44 Stat. 1424; June 25, 1938, ch 685. § 1, 52 Stat. 1164; Oct. 27, 1972, P.L. 92-576, §§ 2(a)(b) 3, 5(b) 15(c), 18(b), 20(c), 86 Stat. 1251, 1262.)

§ 903. Coverage

(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employee in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

(Mar. 4, 1927, ch 509. § 3, 44 Stat. 1426; Oct. 27, 1972, P. L. 92-576, §§ 2(c), 21, 86 Stat. 1251, 1265.)

§ 905. Exclusiveness of liability

(a) The liability of an employer prescribed in section 4 [33 USCS § 904] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act [33 USCS § 933], and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person

was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.
(Mar. 4, 1927, ch 509, § 5, 44 Stat. 1426; Oct. 27, 1972, P. L. 92-576, § 18(a), 86 Stat. 1263.)

DELAWARE CODE Ann. tit. 23, § 121 (1987)

§ 121. Receipt of pilots by vessels; penalties for refusal; jurisdiction.

Every foreign ship or vessel and every ship or vessel engaged in foreign commerce or trade arriving from or bound to any foreign port or place, passing in or out of the entrance to Delaware Bay, and passing between the points of land known as the Capes of the Delaware, shall be obliged to receive a pilot. For the purposes of this section, the entrance to Delaware Bay is defined as that body of water bounded by the New Jersey and Delaware coasts as they border the Atlantic Ocean and included within an arc of 20-mile radius as measured from the top of the lighthouse known as "Harbor of Refuge Light." If the master of any ships or vessels, after she is spoken or a pilot offered, refuses or neglects to take a pilot, the master, owner or consignee of such vessel shall forfeit and pay to any such pilot suing for the same a sum equal to the pilotage of such ship or vessel to be recovered by a suit in the courts of this State or before a justice of the

peace, or such pilot may pursue his remedy therefor by a libel in admiralty in any United States court either in personam or by proceeding in rem, to enforce the lien given him on such ship or vessel, as such pilot may see fit and proper to do. (16 Del. Laws, c. 449, § 5; 17 Del. Laws. c. 145, § 1; 18 Del. Laws, c. 619, § 2; Code 1915, § 957; Code 1935, § 1069; 23 Del. C. 1953, § 121; 62 Del. Laws, c. 105, § 7.)